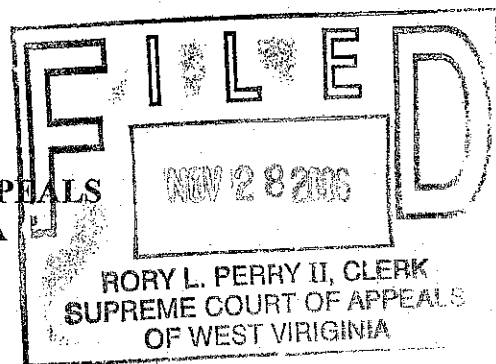


IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NUMBER ~~061078~~

33207



ERIC JASON BROOKS,

Plaintiff Below, Appellant,

vs.

GALEN OF WEST VIRGINIA, INC.,
d/b/a GREENBRIER VALLEY MEDICAL
CENTER and GREENBRIER VALLEY
MEDICAL CENTER, LLC, d/b/a
GREENBRIER VALLEY MEDICAL
CENTER,

Defendant Below, Appellee

BRIEF OF APPELLANT

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Counsel for Appellant

KIND OF PROCEEDING AND NATURE OF RULING

This is a Petition for a Writ of Error to the rulings of the Circuit Court of Greenbrier County, West Virginia, the Honorable James Rowe, denying the Plaintiff's Motion to Set Aside the Jury Verdict and Award the Plaintiff a New Trial, entered on January 30, 2006, after a jury trial having been conducted in this action and a defense verdict being returned on August 29, 2005.

STATEMENT OF CASE AND FACTS

On February 21, 2000, the plaintiff, Eric Jason Brooks, went to the emergency room of the defendant hospital, Greenbrier Valley Medical Center, with complaints of abdominal pain. The plaintiff was admitted to the hospital to rule out appendicitis. During said hospitalization, an I.V. was inserted into the plaintiff's left hand which resulted in an infiltration. As a result of said infiltration, plaintiff developed "CRPS," also known as Chronic Regional Pain Syndrome, or Reflex Sympathetic Dystrophy, also known as "RSD."

The plaintiff was discharged from said defendant hospital on February 23, 2000, and returned to the emergency room several hours later on the same date, complaining of swelling and pain in the dorsum of his left hand and forearm. The plaintiff was diagnosed with phlebitis, left arm and sent home with instructions to use compresses, elevate his arm, and return if his temperature became greater than 100.4 degrees.

The plaintiff again returned to the emergency room of the defendant hospital on February 27, 2000, complaining of pain in his arm. He was once again seen in the emergency room of the defendant hospital and diagnosed with superficial thrombophlebitis and questionable cellulitis of the left upper extremity secondary to IV therapy. He was instructed to continue with elevation of the arm above his head and to follow up with his family physician.

The plaintiff then sought the services of his family physician, who referred him to Greenbrier Valley Medical Center on March 14, 2000, with complaints of left arm pain, which had become unbearable.

Thereafter, the plaintiff sought the services of numerous physicians in an effort to be cured of the above condition and eventually had an morphine pump inserted to alleviate some of the pain of his condition.

The plaintiff, Eric Jason Brooks, contends that the defendant, Greenbrier Valley Medical Center, acting by and through its physicians, nurses, agents, and employees, negligently and improperly treated him by improperly inserting the aforesaid I.V., causing injury to his left arm, and further negligently and improperly failed to treat him for the injuries to his arm on his numerous return visits to the emergency room of the defendant hospital.

On or February 14, 2002, the plaintiff, Eric Jason Brooks, filed a civil action in the Circuit Court of Greenbrier County, West Virginia, against the defendant, Greenbrier Valley Medical Center, alleging that said defendant hospital, acting by and through its physicians, nurses, agent, and employees, deviated from and fell below the accepted standard of medical care in the treatment rendered to the plaintiff, Eric Jason Brooks, during his hospitalization and return visits to the emergency room of said hospital. In said civil action, the plaintiff, Eric Jason Brooks, asserted that the defendant, acting by and through its nurses, improperly inserted the I.V. into the plaintiff's left hand, thereby causing damage to the plaintiff's left

hand, arm, and which damage caused the plaintiff to suffer from "CRPS," also known as Chronic Regional Pain Syndrome, or Reflex Sympathetic Dystrophy, also known as "RSD."

The underlying civil action went to trial in the Circuit Court of Greenbrier County, West Virginia, and on August 29, 2005, the jury returned a verdict in favor of the defendant, Greenbrier Valley Medical Center.

The plaintiff timely filed a Motion to Set Aside the Jury Verdict and Award the Plaintiff a New Trial, setting forth several grounds of error in said motion. The lower court herein determined that the jury trial of this action contained no error and therefore, entered an order denying the Motion to Set Aside the Jury Verdict and Award the Plaintiff a New Trial on January 30, 2006.

**TIMELINE OF APPELLANT'S
MEDICAL PROVIDERS WITH
ATTACHED MEDICAL RECORDS
AS EXHIBITS 2 -11 SUPPORTING DIAGNOSIS**

Exhibit 2

**Greenbrier Valley Medical Center (Diagnosis – Ruptured Appendix)
2/21/00 - 2/23/00**

Exhibit 3

**Greenbrier Valley Medical Center (Diagnosis - Phlebitis)
2/23/00**

Exhibit 4

**Greenbrier Valley Medical Center
(Diagnosis - Superficial Thrombophlebitis & Cellulitis)
2/27/00**

Exhibit 5

**Iraj Derakhshan, M.D. (Diagnosis - Vascular Event)
3/20/00 - 5/8/00**

Exhibit 6

**Frank Lucente, M.D. (Diagnosis - Possible RSD)
3/21/00 - 5/12/00**

Exhibit 7

**Dr. D'Amours (Diagnosis - Possible CRPS)
5-25-00 - 8/3/00**

Exhibit 8

**HealthSouth
(Diagnosis - Left upper extremity pain, neuropathic & somatic generators of pain)
8/6/01 - 8/20/01**

Exhibit 9

**Dr. Caress (Diagnosis - Probable CRPS)
Dr. Spillane (Diagnosis - Possible CRPS)
11/13/02 - 1/6/03**

Exhibit 10

**Christopher Kim, M.D. (Diagnosis - CRPS)
2/25/03 - Present**

Exhibit 11

**Report of Nelson Hendler, M.D. (Diagnosis - CRPS II)
(Appellee's Expert - Evaluation of 8/18/04)**

STANDARD OF REVIEW

The standard of review when a trial judge denies a Motion for a New Trial is abuse of discretion. In re State Public Bldg. Asbestos Litigation, 193 W. Va. 119, 454 S.E.2d 413 (1994). However, where the issue on appeal is clearly a question of law, the standard of review is de novo. Chrysler R. M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Sanders v. Georgia-Pacific Corp., 159 W. Va. 621, 225 S.E.2d 218 (1976).

When the trial court took judicial notice of the findings of the Social Security Administration in the appellant's disability hearing, based upon collateral estoppel/issue preclusion principles, the standard of review applicable to the trial court's ruling is a de novo standard.

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED BY TAKING JUDICIAL NOTICE OF THE FINDINGS AND DECISION OF THE SOCIAL SECURITY ADMINISTRATION AT APPELLANTS' DISABILITY HEARING ALLOWING THE JURY TO IMPROPERLY HAVE KNOWLEDGE OF A COLLATERAL SOURCE.

Although the appellant respectfully submits that the above issue collectively with Issue #2, (i.e., whether the trial court erred by taking judicial notice of the findings of the Social Security Administration at appellant's disability hearing allowing the jury to consider

a medical condition that did not have any independent medical basis) improperly influenced the jury by allowing testimony and arguments regarding appellant's collateral source, all to the prejudice of the appellant.

In light of this Honorable Court's previous ruling in Keese v. General Refuse Services, 216 W. Va. 199, 604 S.E.2d 449 (2004), the appellant withdraws this issue because the jury never reached the damages portion of the jury verdict form. Pursuant to Keese, although the introduction of a collateral source would be prejudicial, the appellant recognizes that since the jury did not contemplate damages, this issue would be harmless error.

II. WHETHER THE TRIAL COURT ERRED BY TAKING JUDICIAL NOTICE OF THE FINDINGS OF THE SOCIAL SECURITY ADMINISTRATION AT APPELLANT'S DISABILITY HEARING ALLOWING THE JURY TO CONSIDER A MEDICAL CONDITION THAT DID NOT HAVE ANY INDEPENDENT MEDICAL BASIS.

In Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983), the Court stated that "[c]ollateral estoppel is designed to foreclose relitigation of issues in a second suit even though there may be a difference in the cause of action between the parties of the first and second suit." The Court stated further that "under certain conditions mutuality of parties is no longer necessary in order to enforce a judgment against a party or his privy."

The Court also stated that "[w]hether a stranger to the first action can assert collateral estoppel in the second action depends on several general inquiries: Whether the issues presented in the present case are the same as presented in the earlier case; whether the controlling facts or legal principles have changed substantially since the earlier case; and,

whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair.” Id. At 591. The rationale for collateral estoppel/issue preclusion is to give justice rather than deny justice.

(a) Whether the issues presented in the present case are the same as presented in the earlier case.

The issue in the earlier case is whether Eric Brooks meets the Social Security Administration’s guidelines for disability. In the present case, it is whether as a result of the appellee’s alleged deviation from the accepted standard of care, the appellant is now disabled. Although these two issues appear to be the same, the appellant respectfully submits that the evidence in the trial of this case was devoid of any medical diagnosis of a somatoform disorder, except for Dr. Hendler, appellee’s expert, who by the court taking judicial notice of the Social Security Administration’s findings, accepted the somatoform disorder as fact. Thus, the appellant respectfully submits that the evidence and testimony relevant to the two proceedings are different, especially since the appellant does not carry a diagnosis of a somatoform disorder.

(b) Whether the controlling facts or legal principles have changed substantially since the earlier case; and, whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair.

Clearly, under this factor, the controlling facts and legal principles of this case have changed substantially since the Social Security Administration’s disability hearing. Since the SSA’s disability hearing, the appellant, Eric Brooks, saw four specialists with respect to

his injury to his left arm: Dr. Caress, Dr. Spillane, Dr. Kim, and Dr. Hendler, the appellee's expert. All four specialists diagnosed the appellant with Chronic Regional Pain Syndrome. In fact, the appellee's expert, Dr. Hendler, diagnosed the appellant with CRPS as a result of a direct nerve injury. There is no mention of a somatoform disorder by any medical provider.

Additionally, the appellant had a spinal cord stimulator on a trial basis, and has had a morphine implant to safely control the pain from the CRPS, without the use of large amounts of oral medication. Clearly, the controlling facts that the appellant has CRPS, and not a somatoform disorder, has been developed more fully, as well as substantiated by additional medical providers since the SSA's hearing.

(c) Whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair?

Clearly, there is no confirmed diagnosis of a somatoform disorder. There is only a reference to somatic generators of pain by one medical provider, HealthSouth. Mr. Brooks has had only one psychological evaluation, and that was done at HealthSouth. Even the psychological evaluation at HealthSouth failed to confirm a diagnosis of a somatoform disorder, the SSA had to have used Healthsouth's medical records wherein "somatic generators of pain" is merely mentioned.

A somatoform disorder is a severe mental disorder wherein a person has subjectively perceived physical complaints with no explainable medical condition.

When the trial court took judicial notice of the ("SSA") findings with respect to a somatoform disorder, the jury heard evidence and had to accept as a fact, a severe mental

disorder that the appellant had not been diagnosed with having. One effect of this ruling was to attack the credibility of the appellant, wherein the appellant testified that he complained of pain at the I.V. site at Greenbrier Valley Medical Center; however, none of his complaints of pain were documented; thereby, allowing the appellee to attack the appellant's "credibility with the somatoform disorder.

According to the appellant's testimony, the reflex sympathetic dystrophy and/or chronic regional pain syndrome was a condition that did not neatly fall within a severe impairment category of social security disability. After appellant's counsel and the ALJ discussed the matter, they decided to include the somatoform disorder to assist the appellant in receiving social security disability benefits.

In fact, the defendant's expert, Nelson Hendler, M.D., was allowed to discuss a somatoform disorder even though Dr. Hendler was never disclosed by defense counsel to discuss this condition. Dr. Hendler stated that the Court had taken judicial notice of the condition he was going to discuss. Nevertheless, Dr. Hendler, who testified that he was on the Committee of the American Psychiatric Association that wrote the Diagnostic and Statistical Manual of Mental Disorders, testified that Eric Brooks did not meet the criteria for somatoform disorder. (See Exhibit No. ____).

Therefore, when the trial court took judicial notice of the SSA's findings, the trial court allowed testimony and arguments of a severe mental disorder that had no independent medical basis, that the jury had to accept as fact, based only upon the findings of the Social

Security Administration, which was unfairly prejudicial, clearly misled the jury and confused the issues. Certainly, there are special circumstances that would conclude that enforcement of the Social Security Administration's findings and/or judgment is unfair at this trial.

III. WHETHER THE TRIAL COURT ERRED BY IMPROPERLY EXCLUDING APPELLANT'S PLEADED THEORY OF LIABILITY WITH RESPECT TO DEVIATIONS OF THE EMERGENCY ROOM PHYSICIANS.

Appellant filed this action on February 14, 2002, against the defendant hospital, alleging in his original pleading, that on repeated visits to the emergency room, the defendant hospital, acting by and through its emergency room physicians, failed to properly treat the appellant and/or fell below the accepted standard of care in the treatment rendered to the appellant.

Throughout discovery conducted in this action, there was evidence and testimony that reflected criticism of the care the appellant received at the emergency room of the defendant hospital.

In addition to the aforesaid discovery, counsel for the appellant forwarded to counsel for the defendant a written note from one of petitioner's expert witnesses on the issue of causation and standard of care which offered a preliminary criticism of the care and treatment appellant Brooks received or did not receive on his return visit to the emergency room of the defendant hospital on the date he was initially discharged and again on the date he returned four (4) days later.

Appellant informed the lower court that his expert witness, Thomas Furlow, M.D., was going to be critical of the medical care and treatment received by the appellant, Eric Brooks, during his return visits to the emergency room of said hospital on the date of his original discharge and when appellant returned again four (4) days later.

It was obvious from the pleadings and evidence and representation of counsel, the appellant, Brooks, suffered from a condition named "RSD," (Reflex Sympathetic Dystrophy) and more recently referred to as "CRPS," (Chronic Regional Pain Syndrome).

Appellant, Brooks, over an extensive period of time, has received various methods of care and treatment from many different physicians and hospitals in an effort to relieve him of the chronic and severe pain from which he suffers, as a direct and proximate result of the lack of proper care and treatment rendered by the defendant, Greenbrier Valley Medical Center.

The defendant herein made a motion to exclude any testimony by the aforesaid Thomas Furlow, M.D., which motion was initially held in abeyance and then eventually granted by order entered on August 15, 2005, and the jury herein was not permitted to hearing any testimony regarding the criticisms against the emergency room physicians at the defendant hospital.

The practical effect of the lower court's ruling was to strike one of the theories of liability against said defendant hospital, even though said theory of liability was originally pleaded.

The lower court, by excluding any evidence of medical negligence in the care and treatment of the petitioner in the emergency room of the respondent, Greenbrier Valley Medical Center, in effect, denied the Petitioner his pleading and pursued allegation of liability for his treatment after his initial discharge from the hospital.

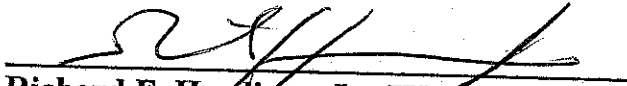
This ruling by the lower court was clearly erroneous.

WHEREFORE, the appellant, Eric Jason Brooks, by counsel, Richard E. Hardison, Jr., respectfully submits that the lower court erred in the aforesaid rulings, and respectfully requests that this case be reversed and remanded to the lower court for a new trial, and any other relief this Honorable Court deems proper.

RESPECTFULLY SUBMITTED,

ERIC JASON BROOKS

By Counsel



Richard E. Hardison, Jr. (WVSB #8627)
Counsel for Appellant, Plaintiff-Below
P.O. Box 1700
216 Main Street
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CERTIFICATE OF SERVICE

I, Richard E. Hardison, Jr., do hereby certify that the foregoing **Brief of the Appellant** was served upon the Appellees, by mailing a true copy thereof to William F. Foster, II, Esq., P.O. Box 3234, Charleston, WV 25332, by United States Mail, postage prepaid, on this the 27th day of November, 2006.



RICHARD E. HARDISON, JR.